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IN THE

Supreme Court of the United States

OCTOBER TERM _____

NO. 74-1171

INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION,
LOCAL NO. 1581, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

To The Honorable Chief Justice and Associate Justices Of The Supreme Court Of The United States:

Petitioner prays that a Writ of Certiorari issue to remand the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 13, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 489 F.2d 635 (App. A, infra. pp. 11-18). The Findings of Fact, Conclusions of Law, and Order of the National Labor Relations Board are reported at 196 N.L.R.B. No. 180. (App. B, infra. pp. 19-28)

JURISDICTION

The Decree of the Court of Appeals granting enforcement of the Order of the National Labor Relations Board was entered on March 13, 1974 ,(App. C, infra. pp 29-30). The Union's Petition for Rehearing was denied on April 16, 1974, (App. D, infra. p. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The Union instituted a job referral system whereby preference was given to (1) United States Citizens; (2) Mexican nationals whose families resided in the United States; (3) Mexican nationals whose families resided in Mexico. Institution of the system caused employee Guerra, an alien whose family resided in Mexico, to be transferred from the better paying Commodity and Dock Department to the Compress and Warehouse Department. The question presented is whether the Union violated § 8(b)(2) and (1)(A) of the National Labor Relations Act by effecting the job transfer of Guerra, an alien whose family resided in Mexico.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29

U.S.C. 151, et seq.), are set forth in Appendix E, infra. pp. 32-43.

STATEMENT

The Union Petitioner is a small union (80-150 members) composed entirely of Mexican Americans and Mexican Nationals. During negotiations in 1965 the Union, pursuant to a vote of its members, requested and the company agreed that the union job referrals to the employer would give preference to United States citizens. (A. 9, 19-20, 24)[1] Under the system, jobs in the preferred Dock and Commodity Departments were to be filled under the following priority: (1) United States citizens; (2) Mexican nationals whose families resided in Houston; and (3) Mexican nationals whose families resided in Mexico. (A. 9, 20, 24) Under the plan, employee Guerra, an alien whose family resided in Mexico, was transferred from the better paying Dock and Commodity Department to the Cotton and Warehouse Department. Before his transfer Guerra was told by the Union President that he could continue to work in the Dock and Commodity Department if he became a United States citizen or moved his family to the United States. (A. 9, 21) After Guerra's transfer, other Mexican nationals whose families resided in the United States continued to work in the Dock and Commodity Department. (A. 24)

Besides higher pay the employees in the Dock and Commodity Department were covered by a hospitalization plan which also covered their families if their families resided in the United States (A. 9-10, 24). The hospitali-

1. "A" references are to the printed appendix contained in the record herein. The printed appendix contains the stipulation of facts entered into by General Counsel and the Union.

zation plan for employees in the Cotton Warehouse Department only covered the employee. (A. 10, 24)

The Board's Trial Examiner found on these stipulated facts that "There is no invidious discrimination on the basis of race or national origin; there is only distinction on the basis of family residence; a distinction which is reasonable in purpose and one which, in any event, can be avoided by moving the employee's family to the United States." (A. 6) The Trial Examiner found that the Union's policy of assigning preferences to workers with their families in the United States was intended "to restrict employment in the Dock and Commodity Department to employees eligible for family participation in the hospitalization program" and that such a policy had a "salutory effect on employment relations both from the standpoint of fixing company costs and employee benefits among employees." (App. A, p. 17) The Board in overruling its Trial Examiner cited this Court's opinion in *Bridges v. Wixon,* 326 U.S. 135, 161 and concluded that an employee's citizenship and residence of his family were not permissible classifications that could be made by a Union. (App. B, p. 21) The Board further found that such a distinction encouraged union membership and was therefore violation of § 8(b)(1)(A) and (2) of the Act.

The court of appeals upheld the Board's decision and order, finding that "classifications based on citizenship, like classifications based on race, are arbitrary and invidious." (App. A, p. 15) The court of appeals further held that there was substantial evidence to support the Board's finding that there had been an impermissible encouragement of union membership in violation of § 8(b)(2) and (1)(A) of the Act.

REASONS FOR GRANTING THE WRIT

1. The issue raised poses a question of substantial public importance which has never been decided by the Court. Petitioner is aware of the many decisions of this Court holding that certain State classifications based on alienage are in violation of the Fourteenth Amendment of the United States Constitution. *Truax v. Raich,* 239 U.S. 33 (1915); *Takahashi v. Fish and Game Comm.,* 334 U.S. 410 (1948); *Graham v. Richardson,* 403 U.S. 365 (1971). Petitioner is not aware of any decision by this Court that a distinction based on citizenship made by a collective bargaining agent can be the predicate for a finding of an unfair labor practice under Sections 8(a)(3), (b)(1)(A), (b)(2) of the National Labor Relations Act as amended. 29 U.S.C.A. §158(a)(3), (b)(1)(A), (b)(2). The closest analogy petitioner can find is this Court's decision in *Espinoza v. Farah Manufacturing Co., Inc.,* 94 Sup. Ct. 334 (1973) wherein this Court held that distinctions based on alienage by a private employer were not violative of the Equal Employment Opportunity Act of 1965. The Court was mindful of the legislative history of the Act, including the fact that there was no expressed legislative intention to preclude private distinctions based on alienage.

The decision of the court below engrafts upon the National Labor Relations Act a reach that cannot be supported by legislative history. Under this Court's decision in *Radio Officers' Union v. N.L.R.B.,* 347 U.S. 17, 42-43 (1954) to find a violation or unfair labor practice under § 8(b)(2) under the act there must be two elements, (1) an impermissible discrimination by the Union which (2) causes or tends to result in the encouragement or discouragement of union membership. Under the record

before the Court below and carrying the Court's opinion to its logical conclusion, the Court has held that any distinction by a Union which gives a United States citizen job preference is a per se violation of § 8(b)(2) since both elements may be inferred. Such a statutory construction is contrary to the decisions of this Court and permits the National Labor Relations Board to pursue a "broader, more pervasive regulatory scheme" than the "specific discriminatory policies envisioned by Congress." *Local 357 International Brotherhood of Teamsters,* supra, 365 U.S. 667, 676. The issue of a Union's power to make distinctions based on citizenship similar to that of a private employer presents a question of national importance in the area of labor relations which should be resloved by this Court.

2. The Union had a legitimate business interest in making distinctions based on family residence and citizenship. The families of employees in the Dock and Commodity Department who lived in the United States were entitled to negotiated insurance benefits. The Administrative Law Judge found that the Union's policy of issuing preferences to workers with their families in the United States was intended to restrict employment in the Dock and Commodity Department to employees eligible for family participation in the hospitalization program. He concluded that the policy had a "salutary effect on employment relations both from the standpoint of fixing company costs and equalizing benefits among employees." (A. 6) The judge had before him evidence that other Mexican nationals whose families resided in the United States continued to work in the Dock and Commodity Department. In addition, there was the desire of the Union to give preference to those who had evidenced an economic state in the area serviced by the Union.

3. The finding of an unfair labor practice by the National Labor Relations Board is not supported by substantial evidence on the record as a whole. Since the facts were stipulated the court below treated the matter as a question of law, but in so doing the court made presumptions that exceeded the stipulated facts and failed to "take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 488 (1951). In finding the first element necessary under this Court's ruling in *Radio Officers' Union* to support a finding of a violation of § 8(b)(2) the court below cited this court's decisions in *Graham v. Richardson,* 403 U.S. 365 (1971), *Hellenic Line Limited v. Rhoditis,* 398 U.S. 306, 309 n. 5, and *Takahashi v. Fish & Game Comm.,* 334 U.S. 410 (1948). All of these cases involved state laws. None of them involved the National Labor Relations Act and it is difficult to analogize the two where there are these facts: (1) Aliens with a declared intention of becoming a United States citizen get the same preference as a United States citizen; (2) An insurance plan which caused an employer to make a distinction based on costs between a family living in the United States and those living without; (3) Aliens with families residing in the United States continued working in the higher paying Dock and Commodity Department.

In finding "substantial evidence" to support the record element the Court below indulges in the negative inference that "the Union did not request the transfer of groups other than aliens such as single men who could not avail themselves of the benefits of the family hospitalization plan." (App. A, p. 17) This ignores the fact that the record is devoid of any showing that this small union represented any "groups . . . such as single men."

4. The union's hiring hall procedure of giving job preference to citizens is in accord with our national policy as expressed by Congress at 8 U.S.C. § 1153(a)(6) and 8 U.S.C. § 1182(a)(14). These laws provide that aliens shall not be permitted to enter the United States for the purpose of performing skilled or unskilled labor unless the Secretary of Labor certifies that there are not sufficient workers in the United States who are able, willing, qualified and available to perform such skilled or unskilled labor. Clearly then it is our national policy to give job preference to United States citizens and to penalize a labor organization for effectuating that policy and to label such a preferential system of hiring as an unfair labor practice not only distorts the National Labor Relations Act, but also frustrates the national policy of job preference for United States citizens.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BROCK & WILLIAMS

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 1974, a true copy of the foregoing Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals, was placed in the United States mail, postage prepaid, to the following counsels: Ms. Abigail Cooley Baskir and Mr. Michael S. Weiner, National Labor Relations Board, Office of General Counsel, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.

Warner F. Brock

WARNER F. BROCK

APPENDIX "A"

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL NO. 1581, AFL-CIO, Respondent.

No. 73-1245.

United States Court of Appeals, Fifth Circuit.

Feb. 19, 1974.

WISDOM, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order against the respondent International Longshoremen's Association, Local No. 1581, AFL-CIO. The order directs the Union to desist from maintaining and enforcing a discriminatory agreement allowing preferences in job referrals to be based upon citizenship and residence of a prospective employee's family and requires the Union to take affirmative action to make whole an employee, Elias Gonzalez Guerra, for loss of pay suffered by him as a result of the discrimination. We grant enforcement.

The facts were stipulated before the Board's Administrative Law Judge. The Union represents employees in both the dock and commodity department and the cotton compress and cotton warehouse department of the Manchester Terminal Corporation, a company with its principal place of business in Houston, Texas. A single labor

agreement covers employees in both departments. All rates of pay for the eleven job classifications in the dock and commodity department are higher than any of the rates of pay for the forty-odd classifications in the cotton compress and cotton warehouse departments.

During contract negotiations in 1965, the Union requested that union job referrals to the employer give preference to United States citizens. Manchester acceded to the request. Accordingly, the Union established a priority system for referrals by the Union for jobs in the preferred dock and commodity department. Under this system, highest priority went to United States citizens; second priority went to Mexican nationals with families residing in the United States; and lowest priority went to Mexican nationals whose families remained in Mexico. Only United States citizens or persons who had declared their intention to become United States citizens were eligible for membership in the Union.

Guerra was employed by Manchester in 1960, and worked in the dock and commodity department from 1963 until September 7, 1965. Guerra is a Mexican citizen and maintains his family in Mexico. After Manchester and the Union had agreed to establish a system of priorities for job referrals based on citizenship, Guerra was transferred, at the Union's request, from the dock and commodity department to the cotton compress and warehouse department, on September 7, 1965. At the time Guerra was told he could not have permanent employment in the dock and commodity department unless he became a United States citizen or moved his family from Mexico. Guerra has worked regularly in the cotton compress and warehouse department since September 7, 1965.

There were differences in the hospitalization plan effective for the workers in the two departments. Under the hospitalization plan effective for the dock and commodity department, both the employee and his family are eligible for hospitalization benefits. Under the plan in effect for workers in the cotton compress and cotton warehouse department, only the employee is eligible for hospitalization benefits.

Guerra brought unfair labor practice charges on October 7, 1965. The Board issued a complaint on May 28, 1971, alleging unfair labor practices under § 8(b)(1)(A), (b)(2) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A), (b)(2) (1970). The Board's Administrative Law Judge issued his decision, recommending dismissal of the complaint, on October 27, 1971. On May 22, 1972, the Board reversed the Administrative Law Judge and issued the order it seeks here to have enforced.[1]

---

1. 1. The Board's order in pertinent part provided:
Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that Respondent, International Longshoremen's Association, Local No. 1581, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Executing, maintaining, performing, or enforcing any agreement, understanding, or practice with the Employer herein, or with any other employer, which allows preferences in job referrals based on citizenship or the residence of the prospective employee's family.

(b) Causing or attempting to cause the Employer herein, or any other employer, to discriminate against employees or prospective employees in violation of Section 8(a)(3) of the Act.

(c) In any other manner restraining or coercing employees or prospective employees of the Employer herein, or any other employer in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

[1] Section 8(b)(2) of the National Labor Relations Act makes it an unfair labor practice "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section". Subsection (a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization". Under the Supreme Court's decision in Radio Officers' Union v. NLRB, 1954, 347 U.S. 17, 42-43, 74 S.Ct. 323, 98 L.Ed. 455, a violation of § 8(b)(2) may be found if two elements are present: (1) an impermissible discrimination by the Union, which (2) causes or tends to result in the encouragement or discouragement of union membership.

[2, 3] In this case, there was substantial evidence to support a finding by the Board that the first of these elements was present. Section 8(b)(2) is not concerned solely with situations where the discrimination involved is between union members and nonmembers, or between "good" members and "bad, or indifferent" members (see *Radio Officers, supra,* 347 U.S. at 40). It applies where the union has induced the employer to discriminate on the basis of any invidious or arbitrary classification, such as the classification based upon alienage involved in this

---

2. Take the following affirmative action which is designed to effect the policies of the Act:
(a) Make Whole Elias Gonzalez Guerra for any loss of pay suffered by him as a result of the discrimination against him, in the manner set forth above in the section entitled "The Remedy."
(b) Notify the Employer herein that it withdraws all objections to Guerra's reinstatement as a permanent employee in the dock and commodity department retroactive to September 7, 1965, with a full restoration of seniority and all other rights and privileges accruing to him as a permanent employee from that date.

case. NLRB v. Miranda Fuel Co., 2 Cir. 1963, 326 F.2d 172, 180-186 (Friendly, J., dissenting); Sovern, The National Labor Relations Act and Racial Discrimination, 1962, 62 Colum.L.Rev. 563, 569-71; cf. Local Union No. 12, United Rubber, etc. Workers of America v. NLRB, 5 Cir. 1966, 368 F.2d 12.

[4] The Supreme Court has made it clear that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 1971, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534. "[Although] the Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores . . . once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." *Hellenic Line Limited v. Rhoditis*, 1970, 398 U.S. 306, 309 n. 5, 90 S.Ct. 1731, 1734, 26 L.Ed.2d 252, quoting from Bridges v. Wixon, 1945, 326 U.S. 135, 161, 65 S.Ct. 1443, 89 L.Ed. 2103 (Murphy, J., concurring). The Supreme Court has struck down state classifications designed "to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn a living." Takahashi v. Fish and Game Commission, 1948, 334 U.S. 410, 418-419, 68 S.Ct. 1138, 1142, 92 L.Ed. 1478; see Truax v. Raich, 1915, 239 U.S. 33, 38-42, 36 S.Ct. 7, 60 L.Ed. 131. Since classifications based on citizenship, like classifications based on race, are arbitrarily and invidious, the Board properly determined that the Union engaged in impermissible discrimination under the Act when it caused Guerra's transfer because he was an alien. See, NLRB v. Local 1367, ILA, C.A. 5, 1966, 368 F.2d 1010, cert. denied, 389

U.S. 837, 88 S.Ct. 58, 19 L.Ed.2d 99 (violation of Section 8(b)(2) and (1)(A) for union to cause employer to discriminate on basis of race.)

[5] There was also substantial evidence to support the Board in finding the second element present. The Board has recognized that a union 's exercise of power to cause an employer to discriminate for arbitrary, irrelevant, or impermissible reasons may impermissibly encourage union membership or union activity. Miranda Fuel Co., 1962, 140 N.L.R.B. 181, enforcement denied, 2 Cir. 1963, 326 F.2d 172; Sovern, *supra*, at 569-71. This view reflects a recognition that the union's ability to effect this kind of discrimination is likely to have an intimidating effect on workers who might otherwise prefer to refrain from union membership or upon members who might like to refrain from any extensive union activity. Judge Friendly expressed this view well a decade ago:

> [The Board] could properly conclude that any such demonstration of union power to discriminate will lead non-members to become members in non-union shops, in the belief that by doing so they will eliminate at least one basis for a union delegate or shop steward causing the employer to take arbitrary action against them. . . .
>
> Even if the Board had been required to limit its consideration to 'encouragement' within the Miranda Fuel Company, it could fairly conclude that action like that of the union here might tend to cause union members to be 'good' members rather than 'bad, or indifferent' members.

NLRB v. Miranda Fuel Co., 2 Cir. 1963, 326 F.2d 172 (Friendly, J., dissenting), quoting *Radio Officers, supra*, 347 U.S. at 40.

In holding that the discrimination effected by the respondent was not invidious, the Administrative Law Judge noted that hospitalization benefits for an employee's family were available only to workers in the dock and commodity department. He found that the union's policy of assuring preferences to workers with their families in the United States was intended "to restrict employment in the Dock and Commodity Department to employees eligible for family participation in the hospitalization program". On that basis, the Administrative Law Judge concluded that the policy had a "salutary effect on employment relations both from the standpoint of fixing company costs and equalizing benefits among employees".

There was substantial evidence, however, to support the Board's contrary conclusion. The Board pointed out that the Union's desire to maximize benefits from its hospitalization plan does not justify its action in regard to Guerra; the "policy of maximizing hospital benefits . . . cannot but work to the detriment of noncitizens of the United States". Besides, as the Board noted in its opinion, the Union's letter in response to Guerra's protest of his transfer made no mention of a desire to maximize benefits flowing to union members. Instead the Union asserted that "it was the feeling of the membership in general that we have no fellow workers who are not citizens of the country and have no desire to be a citizen or permanent resident of the country". Moreover, the Union did not request the transfer of groups other than aliens—such as single men—who could not avail themselves of the benefits of the family hospitalization plan.

The respondent, in its argument here, relies heavily upon NLRB cases permitting union hiring halls to dis-

criminate in favor of local residents in arguing here that the discrimination effected by the Union was not arbitrary or invidious. Local Union No. 337, Plumbers and Fitters, 1964, 147 N.L.R.B. 929, 56 LRRM 1350; Plaza Builders, 134 N.L.R.B. 751, 49 LRRM 1220. That reliance is misplaced. The discrimination here was based upon citizenship, and upon the *national* residence of the employee's *family*, and not upon local residence.

Enforced.

APPENDIX "B"

DECISION AND ORDER

(Number and Title Omitted)

On October 27, 1971, Trial Examiner William J. Brown issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Party filed exceptions to the Trial Examiner's Decision, together with supporting briefs. Later, the Party to the Contract filed cross-exceptions and a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The above-entitled decision was based upon a stipulation of facts entered into by the General Counsel and the Respondent. The Board has considered the Trial Examiner's Decision in light of the exceptions and briefs, and the entire record in this case, and has decided to affirm the rulings, findings, and conclusions of the Trial Examiner only insofar as they are consistent with the following discussion.

Respondent is a labor organization representing employees in both the dock and commodity department and cotton compress and cotton warehouse department of Manchester Terminal Corporatio... During contract negotiations in 1965, the Union requested, and Manchester agreed, that the union job referrals to the Employer would give a preference to United States citizens. Hence, the following priority for job referrals by the Union was established: (1) Persons born in the

United States, (2) Mexican nationals living in Houston with their families, and (3) Mexican nationals whose families lived in Mexico.

As part of this policy of giving preference to United States citizens and Mexican nationals with families residing in the United States, Respondent requested that Elias Gonzalez Guerra be transferred from the dock and commodity department, where he had worked for several years, to the cotton compress and cotton warehouse department. Guerra was a Mexican citizen, and he maintained his family in Mexico. The Employer complied with the Union's request, and Guerra was transferred. All rates of pay for the 40-odd job classifications in the cotton compress and cotton warehouse department are lower than all the rates of pay for the 11 job classifications in the dock and commodity department. The Union informed Guerra that he could maintain his position in the dock and commodity department only if he moved his family to the United States or became a citizen of the United States.

The General Counsel and the Respondent stipulated that the Union requested Guerra's transfer because "Guerra was not an American citizen and because his family lived in Mexico." Also, General Counsel and Respondent stipulated that Respondent asked that Guerra be transferred because under the dock and commodity department contract, there was a hospitalization plan for the employee and his family. However, Guerra's family, living in Mexico, was not entitled to benefits. The membership of the Respondent had voted that every employee in the dock and commodity department should be a person whose family was also eligible to receive some benefit from the hospitilization plan. Under the hos-

pitilization plan in the cotton compress and cotton warehouse department, only the employee is eligible for benefits.

We cannot agree with the Trial Examiner's conclusion that Respondent's desire to maximize benefits from the hospitalization plan justifies its action in regard to Guerra. In applying its policy of maximizing hospital benefits, Respondent has acted in a manner that cannot but work to the detriment of noncitizens of the United States. Certainly, a Mexican national would be more likely to have his family residing out of the United States than would a United States citizen. There is no indication that Respondent requested the transfer of any others —such as single men—who also had no family eligible for hospital benefits. The stipulation states that only Guerra was transferred. When Guerra protested his transfer, the Respondent's reply, in a letter by the recording secretary, made no mention of the hospitalization plan. Rather, Respondent offered to help Guerra move his family to the United States. Under the circumstances of this case, we are convinced that Respondent discriminated against Guerra because he was a noncitizen who refused to bring his family to this country.
The Supreme Court has held:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction be-

> tween citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority. *Bridges v. Wixon,* 326 U.S. 135, 161.[1]

Therefore, we conclude that Guerra's citizenship and the residence of his family did not provide the Union with legitimate reasons for causing Guerra's transfer. Since the terminating or transferring of an employee to satisfy a labor organization encourages membership in that organization and "stands as a warning to employees that the favor and goodwill of responsible union officials is to be nurtured and sustained," we find that Respondent has violated Section 8(b)(1)(A) and (2) of the Act. *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 675 (Mid-Pacific Construction Company),* 161 NLRB 1351; *Local 1070 of the United Brotherhood of Carpenters and Joiners of America (B. W. Horn Company),* 137 NLRB 439, 442.

Further, in requesting and implementing a system of job referrals in which preferences are accorded to persons born in the United States, the Respondent has violated Section 8(b)(1)(A) and (2) of the Act. In determining whether or not action taken by a union either encourages or discourages union membership, we examine the reasonable and general tendency of the union's acts. *San Jose Stereotypers' and Electrotypers' Union No. 120,* 175 NLRB 1066, 1067. Here, it is stipulated that only United States citizens or those who have declared their intent to become United States citizens are eligible for membership in the Respondent. Because

1. *Hellenic Lines Limited v. Rhoditis,* 398 U.S. 306, fn. 5.

Respondent has allowed preferences to those eligible for union membership over those not eligible for union membership, we find that Respondent has encouraged membership in a labor organization. Hence, the Respondent's system of job referrals violates Section 8(b)(1)(A) and (2) of the Act.

The Remedy

It having been found that Respondent has engaged in certain unfair labor practices, it will be ordered to cease and desist thereform and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having caused the Employer herein to transfer Elias Gonzalez Guerra in violation of Section 8(a)(3) of the Act, it will be ordered to notify said Employer forthwith that it withdraws all objections to Guerra's reinstatement as a permanent employee in the dock and commodity department of the Employer, with a full restoration of seniority and all other privileges that would have accrued to him had he not been transferred to the cotton compress and cotton warehouse department, and make the said Guerra whole for any loss of pay suffered by him as a result of the discrimination against him, by payment to him of a sum equal to that which he normally would have earned as wages as an employee in the dock and commodity department from September 7, 1965, to the date on which Respondent complies with notification requirement set forth above, less his net earnings during this period. Backpay shall be computed in the matter set forth in *F. W. Woolworth Company*, 90 NLRB 289, together with interest at the rate of 6 percent per annum as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

It will further be ordered that Respondent cease giving effect to any and all agreements with the Employer herein which give preferences in job referrals based on citizenship or the residence of the prospective employee's family.

Conclusions of Law

1. Manchester Terminal Corporation, the Employer herein, is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent herein is a labor organization within the meaning of Section 2(5) of the Act.

3. By causing the Employer to discriminate against the Charging party, Elias Gonzalez Guerra, in violation of Section 8(a)(3) of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

4. By maintaining in effect an agreement with the Employer whereby preferences in job referrals are based on the prospective employee's citizenship or the residence of his family, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

5. By the aforementioned, the Respondent has restrained and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that Respondent, International Longshoremen's Association, Local No. 1581, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Executing, maintaining, performing, or enforcing any agreement, understanding, or practice with the Employer herein, or with any other employer, which allows preferences in job referrals based on citizenship or the residence of the prospective employee's family.

(b) Causing or attempting to cause the Employer herein, or any other employer, to discriminate against employees or prospective employees in violation of Section 8(a)(3) of the Act.

(c) In any other manner restraining or coercing employees or prospective employees of the Employer herein, or any other employer in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which is designed to effect the policies of the Act:

(a) Make whole Elias Gonzalez Guerra for any loss of pay suffered by him as a result of the discrimination against him, in the manner set forth above in the section entitled "The Remedy."

(b) Notify the Employer herein that it withdraws all objections to Guerra's reinstatement as a permanent employee in the dock and commodity department retroactive to September 7, 1965, with a full restoration of seniority and all other rights and privileges accruing to him as a permanent employee from that date.

(c) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Forthwith return to the Regional Director for Region 23 signed copies of said notices for posting by Manchester Terminal Corporation, if it be willing, in places where notices to its employees are customarily posted.

(e) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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2. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D. C. May 22, 1972.

/s/ EDWARD B. MILLER
Edward B. Miller, Chairman

/s/ HOWARD JENKINS, JR.,
Howard Jenkins, Jr., Member

/s/ JOHN A. PENELLO
John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT execute, maintain, perform, or enforce any agreement, understanding or practice with the Manchester Terminal Corporation, or any other employer, which gives preferences in job referrals by the Union based on citizenship or the residence of the propective employee's family.

WE WILL NOT cause or attempt to cause the Manchester Terminal Corporation, or any other employer, to discriminate in any manner against its employees in violation of Section 8(a)(3) of the National Labor Relations Act, which makes it an unfair labor practice for any employer to discriminate against any of its employees in regard to hire or length of employment or any term or condition of employment, or to encourage or dis-

courage membership in any labor organization, except in compliance with a valid union-shop agreement.

WE WILL notify the Manchester Terminal Corporation that we withdraw all objections to the reinstatement of Elias Gonzalez Guerra as a permanent employee in the Dock and Commodity Department retroactive to September 7, 1965, without prejudice to his seniority and all other rights and privileges which normally would have accrued to him from that date to the present, and will make the said Guerra whole for any loss of pay he may have suffered as a result of our action in causing said Manchester Terminal Corporation to transfer him to the Cotton Compress and Cotton Warehouse Department, from September 7, 1965, to the date that we so notify Manchester.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL NO. 1581, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, Dallas-Brazos Building, 1125 Brazos Street, Houston, Texas 77002, Telephone 713-226-4296.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1245

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL NO. 1581, AFL-CIO, *Respondent*

JUDGMENT

Before: Wisdom, Coleman and Simpson, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, International Longshoremen's Association, Local No. 1581, AFL-CIO, its officers, agents and representatives on May 22, 1972. The Court heard argument of respective counsel on October 1, 1973, and has considered the briefs and transcript of record filed in this cause. On February 19, 1974, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceedings be enforced, and

that International Longshoremen's Asociation, Local No. 1581, AFL-CIO, its officers, agents and representatives abide by and perform the directions of the Board in said order contained.

ENTERED: March 13, 1974

Issued as Mandate: April 24, 1974

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-1245

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL NO. 1581, AFL-CIO, *Respondent*

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING

(April 16, 1974)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "E"

SUBCHAPTER II - NATIONAL LABOR RELATIONS

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedures of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively

safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

§ 152. Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Rail-

way Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" include any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or

concerning the association or representation of persons in negotiating, fixing, maintaing, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training

in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

July 5, 1935, c. 372, § 2, 49 Stat. 450; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 137.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation

fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as

the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the estab-

lishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159 (c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-117

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL NO. 1581, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-18) is reported at 489 F. 2d 635. The Board's decision and order (Pet. App. 19-28) are reported at 196 NLRB 1186.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29-30) was entered on March 13, 1974. A petition for rehearing was denied on April 16, 1974. On July 15, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari until August 14, 1974; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the union violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act by causing the company to transfer employee Elias Guerra to a less desirable position because he was an alien whose family resided in Mexico, and by maintaining a job referral system based on citizenship and family residence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 37-39.

STATEMENT

Elias Guerra, a Mexican national whose family resided in Mexico, had been employed at the Houston, Texas warehouse of the Manchester Terminal Corporation ("the Company") since 1960 (A. 23-24).[1] Since 1963, Guerra worked in the dock and commodity department (A. 23).

Petitioner ("the Union") is the collective bargaining representative of the Company's employees in both the dock and commodity and the cotton compress and cotton warehouse departments (Pet. App. 19; A. 19).[2] The bylaws

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[1]"A." references are to the appendix to the briefs filed in the court of appeals. The case was tried before the Board on a stipulated record (A. 19-25, 29).

[2]Every job classification in the dock and commodity department had a higher rate of pay than any job classification in the cotton warehouse department (Pet. App. 20; A. 23, 41-44, 49-50). In addition, the hospitalization plan for employees in the dock and commodity department provided coverage for the employee and his family whereas the hospitalization plan for employees in the cotton warehouse department covered only the employee (Pet. App. 20; A. 24-25). However, families residing outside the United States did not qualify for coverage under the hospitalization plan for the dock and commodity department (*ibid.*).

of the Union restrict membership to United States citizens or to those who have declared their intent to become United States citizens (Pet. App. 22; A. 70).

During contract negotiations in 1965, the Union asked the Company to give job preference in the dock and commodity department to United States citizens (Pet. App. 19; A. 19-20), and further requested that Guerra be transferred from that department to the cotton warehouse department because Guerra was not an American citizen and his family lived in Mexico (Pet. App. 20; A. 20). The Company acceded to both requests, and it further agreed to accept job referrals from the Union for the preferred dock and commodity department based on the following priority system: first, persons born in the United States; second, Mexican nationals living in Houston with their families; and third, Mexican nationals whose families lived in Mexico (Pet. App. 19-20; A. 20, 24).

The Union's President told Guerra that he would not be permitted to continue to work as a permanent employee in the dock and commodity department unless he moved his family to the United States or became a United States citizen (Pet. App. 20; A. 21). When Guerra protested his transfer, the Union replied, *inter alia* (A. 74-75):

> It was the feeling of the membership in general that we have no other fellow workers that are not citizens of this country and have no desire to be a citizen or permanent resident of our country; Now, as far as we are concerned, it is their privilege and are in their own rights to do whatever they think is best for them and their families;
>
> * * * * *

> We are willing to help and assist you in any possible way that we can to bring your family to the U.S.A. and share with our citizens in the greatness of our beloved country.

Guerra filed an unfair labor practice charge with the Board,[3] which held that the Union violated Section 8(b)(2) and (1)(A) of the Act by requesting and maintaining a job referral system with the Company based on the employees' citizenship and family residence, and by causing the Company to transfer Guerra, an alien whose family resided in Mexico, pursuant to this policy (Pet. App. 22-23).

The Board rejected the Union's contention that it requested Guerra's transfer because it had a policy of maximizing insurance benefits and Guerra's family was not eligible for hospitalization benefits under the Company's plan due to residence outside the United States (see n. 2, *supra*) (Pet. App. 20-21). Rather, the Board found that the Union "discriminated against Guerra because he was a noncitizen who refused to bring his family to this country" (Pet. App. 21). It concluded that "Guerra's citizenship and residence of his family did not provide the Union with legitimate reasons for causing Guerra's transfer," and that discrimination based on such impermissible grounds "'stands as a warning to employees that the favor and goodwill of responsible union officials is to be nur-

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[3]In addition to filing an unfair labor practice charge, Guerra brought a civil action in the United States District Court for the Southern District of Texas alleging violations of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. 1981. *Guerra* v. *Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex.). The district court rejected the Ttile VII claim relying on *Espinoza* v. *Farah Mfg. Co.*, 462 F. 2d 1331 (C.A. 5), affirmed, 414 U.S. 86, but upheld Guerra's claim that 42 U.S.C. 1981 applies to aliens and was violated, the court of appeals affirmed. *Guerra* v. *Manchester Terminal Corp.*, 498 F. 2d 641 (C.A. 5).

tured and sustained'" and thus tends to encourage union membership (Pet. App. 22). The Board further found that the Union, "in requesting and implementing a system of job referrals in which preferences are accorded to persons born in the United States," was in effect allowing "preferences to those eligible for union membership over those not eligible for union membership"; for, "only United States citizens or those who have declared their intent to become United States citizens are eligible for membership in the [Union]" (Pet. App. 22-23).

The Board ordered the Union, *inter alia,* to make Guerra whole for any loss of pay he suffered as the result of the discrimination against him, to notify the Company that it had withdrawn all objections to Guerra's reinstatement as a permanent employee in the Company's dock and commodity department, and to cease maintaining a preferential hiring agreement based on citizenship and family residence (Pet. App. 25-26).

The court of appeals enforced the Board's order (Pet. App. 11-18).

ARGUMENT

The decision below is correct and there is no conflict among the circuits. Further review is therefore unwarranted.

1. Section 8(b)(2) of the Act forbids a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)," which, in turn, forbids an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in a labor organization." Two elements must be present in order to establish a violation of Section 8(b)(2): (1) an impermissible discrimination in regard to a term or condition of employment, and (2) a resulting encouragement or discouragement of union membership

or activity. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 42-43. The court of appeals correctly concluded that there was substantial evidence to support the Board's findings that both elements were present here.

As the court observed (Pet. App. 14): "Section 8(b)(2) is not concerned solely with situations where the discrimination involved is between union members and nonmembers, or between 'good' members and 'bad, or indifferent' members * * * . It applies where the union has induced the employer to discriminate on the basis of any invidious or arbitrary classification * * * ." This Court has made clear that state "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, 403 U.S. 365, 372 (footnotes omitted). Similarly, it is invidious or arbitrary for a union to cause an employee to be discriminated against because he is an alien.[4] Moreover, a demonstration of union power to so discriminate tends to encourage union membership, for it leads nonmembers to believe "that by doing so they will eliminate at lesst one basis for a union delegate or shop steward causing the employer to take arbitrary action against them." *National Labor Relations Board* v. *Miranda Fuel Co.*, 326 F. 2d 172, 183 (C.A. 2), Friendly, J., dissenting.

2. A union violates Section 8(b)(2) of the Act when, under a hiring agreement with an employer, it insists upon preference for its members over non-members. *Local 138,*

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[4]Petitioner contends (Pet. 6) that it had a "legitimate business interest in making distinctions based on family residence and citizenship"—*i.e.*, it desired to restrict employment in the dock and commodity department to employees eligible for family participation in the hospitalization program. However, the court below concluded (Pet. App. 17) that there was substantial evidence to support the Board's finding (Pet. App. 21) that the Union discriminated against Guerra because he was "a noncitizen who refused to bring his family to this country."

International Union of Operating Engineers v. *National Labor Relations Board*, 321 F. 2d 130, 134 (C.A. 2); *National Labor Relations Board* v. *Local 1566, International Longshoremen's Association*, 278 F. 2d 883 (C.A. 3), certiorari denied, 364 U.S. 890. Cf. *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 365 U.S. 667. Such preference is no less unlawful when accomplished by ostensibly objective criteria for referral priority which, in fact, only union members can meet. *National Labor Relations Board* v. *Local 269, International Brotherhood of Electrical Workers*, 357 F. 2d 51, 55-56 (C.A. 3); *International Photographers of the Motion Picture Industries, Local 659*, 197 NLRB 1187, enforced, 477 F. 2d 450 (C.A. D.C.), certiorari denied, 414 U.S. 1157. The Board properly found that the Union, in according employment preferences to citizens, was in effect also discriminating upon the basis of union membership considerations. For, "only United States citizens or those who have declared their intent to become United States citizens are eligible for membership in the [Union]" (Pet. App. 22).

3. Contrary to petitioner's assertion (Pet. 8), immigration policies which restrict the entrance of aliens to this country in order to safeguard the jobs of domestic workers do not provide support for its preference system. Indeed, that system discriminated against those who, like Guerra, had satisfied the requirements of the immigration laws and thus were lawful residents. Petitioner is not aided by *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86. In *Farah* this Court merely held that Title VII of the Civil Rights Act of 1964, which by its terms applies only to discrimination on grounds of race, sex, religion, or ntional orgin (Section 703(a), 42 U.S.C. 2000e-2(a)), does not prohibit discrimination against aliens in private employment. There is no suggestion in this case that the Company would unilaterally have adopted petitioner's preference system, and nothing in *Farah* suggests that a classification based on alienage may be used by a labor organization in a manner which encourages union membership.

CONCLUSION

The petition for a writ of certiorari should be denied.[6]

Respectfully submitted.

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[5]There is no reason to hold this case pending disposition of *Hampton* v. *Mow Sun Wong*, certiorari granted, No. 73-1596. *Hampton* involves the constitutionality of a regulation of the Civil Service Commission which bars resident aliens from employment in the federal competitive civil service. As we point out in our petition in *Hampton* (p. 7) "[t]he power to limit alien access to government employment is an incident of national sovereignty * * *" which arises from the special powers of the federal government to regulate the activities of aliens. The federal power is not involved here and the cases are wholly dissimilar.